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NO. 84-

In The
Supreme Court Of The United States

OCTOBER TERM, 1984

STEVEN ASHERMAN
Petitioner

v.

STATE OF CONNECTICUT
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

1. The jury's consultation of a dictionary definition of inference during deliberation violated the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

2. The jury's performance of unreliable experiments using articles of clothing smuggled into the deliberations room violated the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

3. The trial court instructed the jury that "every person is presumed to intend the natural and necessary consequences of his or her acts" in violation of the Fourteenth Amendment to the United States Constitution.

4. The trial court restricted the defendant's cross examination of expert witnesses with respect to bias interest or prejudice and with respect to the accuracy of an opinion, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

5. The trial court instructed the jury with respect to a charge for which there was no evidence in violation of the Fourteenth Amendment to the United States Constitution.

6. The introduction of results of tests performed on a destroyed blood sample, not available to the defendant, violated the Fourteenth Amendment to the United States Constitution.

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No. 84-

IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN M. ASHERMAN

v.

STATE OF CONNECTICUT

The petitioner, Steven M. Asherman, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut entered in this proceeding on September 26, 1984.

REPORTS OF OPINIONS

The official opinion of the Supreme Court of Connecticut is reported at 193

Conn. 695 (1984). The unofficial report is published at 478 A2d 227 (1984). The summary denial of the petitioner's motion to reargue is unpublished and appears in the Appendix hereto.

The trial court issued unpublished, written opinions on the petitioner's motion to suppress and motions for new trial and on the state's motion for nontestimonial evidence. The opinions appear in the Appendix hereto.

JURISDICTION

(i) The decision of the Supreme Court of Connecticut was released on July 17, 1984.

(ii) The Supreme Court of the State of Connecticut denied the petitioner's motion to reargue on September 26, 1984.

(iii) The petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(3).

PROVISIONS OF CONSTITUTION, STATUTES AND RULES INVOLVED

(i) United Sta es Constitution, Fourth Amendment:

(ii) United States Constitution, Fifth Amendment:

(iii) United States Constitution, Sixth Amendment:

(iv) United States Constitution, Fourteenth Amendment:

(v) Connecticut General Statutes, Section 53a-54a.

(vi) Connecticut General Statutes, Section 53a-55.

(vii) Connecticut Practice Book, 1978, Section 758.

(viii) Connecticut Practice Book, 1978, Section 759.

STATEMENT OF THE CASE

STATEMENT OF FACTS

On the morning of July 30, 1978, on Jones Mountain in New Hartford, Connecticut, the body of Michael Aranow was discovered, dead as a result of multiple stab wounds.

Earlier that morning, Steven Asherman had reported Aranow missing. He reported to Frank Jones, Aranow's uncle, that he and Aranow had arrived in New Hartford after dark on the previous evening and had walked along a trail toward a place described by Aranow as "the Lookout". Asherman and Aranow were medical students in the same class and had long been close friends. They were taking a respite from their studies by visiting Jones Mountain, a place familiar to Aranow but unknown to Asherman. Asherman reported that he and Aranow were confronted along the trail by two drunken, armed and belligerent men. Asherman and Aranow fled into the woods and were separated. Asherman became lost in the darkness. After

daybreak, he found his way to the Jones' house.

Evidence indicated that Aranow died of multiple stab wounds, consistent with the use of two weapons; one weapon was likely to have been a heavy bladed instrument such as an axe. An exhaustive search of the area failed to uncover any weapons. Asherman had with him only a small day-pack which he lost some time after he was separated from Aranow; the search also failed to produce the pack. At trial, one witness testified that, on the morning of Aranow's death, she gave a hitchhiker who appeared nervous and apprehensive and whose clothing appeared blood soaked.

After Asherman was taken into custody, a set of keys were seized from his pants pocket. An officer noticed a hair stuck in crusty-like material on a key. The keys and key ring were transferred, unprotected, in an envelope contained in a box with other items, all of which were loosely packaged. A substance on the key ring was determined to be blood; it was consumed by the testing. A broken hair removed from the key ring could have originated from Aranow's head. No one could explain how the blood and hair could have migrated from the key to the key ring.

Pictures taken at the autopsy were introduced and expert testimony presented to identify marks on Aranow's body as bite marks. The state's

forensic odontologist, Dr. Luntz, testified that in his opinion the bite marks were caused by Asherman. Luntz based his opinion upon comparison of impressions and photographs of Asherman's teeth with photographs of Aranow's body. Identifying bite marks involves the use of generally accepted techniques, many of which were not utilized in this case. The autopsy photographs were distorted. Forensic odontologists called by the petitioner testified that "to a reasonable degree of dental certainty, to the point of absolute certainty, [Asherman's] teeth could have in no way made this mark." Dr. Sopher, called by the state in rebuttal, testified that the petitioner

could not be excluded from the class of those who might have inflicted the mark.

The trial court restricted the cross-examination of Luntz and of Sopher, concerning relationships between the two experts and between Luntz and law enforcement agencies, and concerning the accuracy of Luntz's methods.

A jury of twelve rendered a verdict of guilty of manslaughter. Subsequently, jurors testified at a hearing concerning acts of misconduct. During deliberations, Juror Streib read to the jury a Funk & Wagnall's definition of "inference" which included "3. loosely, a conjecture". Jurors Henry and Turner described experiments performed by using a shirt and belt smuggled into the deliberation room.

Juror Turner had concealed a cut-off shirt and a belt in a bag of apples and carried them. To test the claim of the State that Asherman, alone, could have carried Aranow, one juror put on the belt and shirt while another attempted to lift him. The first try was unsuccessful. The second was not. Neither the shirt nor the belt were in evidence. In fact, there was no evidence that Aranow had been wearing a belt. Aranow's shirt was not cut off; it was a full trial exhibit.

STATEMENT OF PROCEEDINGS

On October 31, 1978, the defendant was indicted for murder, in violation of

Connecticut General Statutes, Section 53c-54a(a).

By pretrial motion, the defendant requested the production of blood samples for testing by his expert. The request is set forth as Appendix B. During the presentation of the state's evidence, the trial court admitted a set of keys and a hair sample into evidence, over the defendant's objection. The trial court permitted a state's witness to testify that he found blood on the key ring and hair. The defendant moved to strike the testimony and the exhibits. The trial court's decision is set forth as Appendix C. The question was presented on appeal.

The state called Dr. Luntz and Dr. Sopher as expert witnesses. During the

cross-examination of each, the trial court restricted the defendant's inquiry and the defendant excepted to the rulings. The defendant's questions and the court's rulings are set forth as Appendix D and Appendix E. The questions were presented on appeal.

The trial court instructed the jury concerning a presumption of intent. The court's instruction is set forth as Appendix F. The defendant raised the question in his motion for new trial; the trial court's decision is set forth as Appendix G. The question was presented on appeal.

The trial court instructed the jury concerning the lesser-included offense of manslaughter. The court's instruction is set forth as Appendix H.

The defendant took exception to the instruction and raised the question in his motion for new trial; the trial court's decision is set forth as Appendix G. The question was presented on appeal. The defendant's claim under the equal protection clause of the Fourteenth Amendment was addressed in his motion to reargue.

The jury, during its deliberations, consulted a dictionary definition of the term "inference". The jury also imported a shirt and belt, not in evidence, into the deliberation room for an experiment. The defendant moved for a new trial; the trial court's written decision denying the motion is set forth as Appendix I. The question was presented on appeal.

REASONS FOR ALLOWANCE OF WRIT

1. JURY'S CONSULTATION OF DICTIONARY

A. The use of a dictionary, by the jury, to define the term "inference", constituted a violation of the due process guarantee of the Fifth and Fourteenth Amendments to the United States Constitution.

In consulting an ordinary dictionary for the meaning of the term "inference", the jury invaded the function of the court

"Ad questionem facti, non respondent judices, ad questionem juris, non respondent juratores." Isaack v. Clark, Rolle 1, 132, 2 Bulstr. 314 (1613-14). The jury shall decide issues of fact, the Court shall decide the law.

The division of functions within the courtroom was recognized in early common law. That division forms a basic element of trial by jury. The same division of functions was accepted by the drafters of the Constitution and became a part of the Constitutional guarantee of due process.

> "Tribunals for the trial of crimes were intended to be constituted as all common law tribunals in which trial by jury was practiced were constituted, having one or more judges who were to preside at the trials and form one part of the tribunal, and a jury who were to form the other part." United States v. Morris, 1 Curtis C.C.R. 23, 49 (1st Cir. 1851).

The division is reflected in Connecticut law:

> "The court shall decide all issues of law and all questions of law arising in

> the trial of criminal cases...otherwise the court shall submit the facts to the jury without directing how to find their verdict." Connecticut General Statutes, Section 54-89, Connecticut Practice Book, 1978, Section 855.

It is fundamental that the court shall decide the law and state the law to the jury, and that the jury shall apply that law to the facts as the jury finds them. The jury are a coordinate branch of the tribunal having their appropriate powers, rights and duties, but it is not within their province to decide any question of law. United States v. Morris, supra at 61, United States v. Riley, 5 Blatch, C.C. 204, 206 (S.D.N.Y. 1864).

The evidence at trial was primarily circumstantial. A case of

circumstantial evidence depends upon the drawing of inferences to establish guilt. Accordingly, the jury was instructed on the drawing of inferences from circumstantial evidence.

Although the drawing of inferences is within the province of the jury, the definition of the term "inference" as it is applied in the law, is not.

The Connecticut Court failed to acknowledge the distinction, recognized within the cases upon which it relied, between commonly known words and words having a particular meaning within the law. "Inference" has a particular legal meaning, as does "reasonable" in the phrase "reasonable doubt", Alvarez v. People, __Colo__ 653 P.2d 1127 (1982), "circumstantial evidence", State v.

Holmes, 17 Ore. App. 464, 522 P. 2d 900 (1974), or "undue influence", Schultz v. State, 417 N.E. 2d 1127 (Ind. App. 1981).

In this case, the jury invaded the province of the court, denying the defendant the protection of due process of law as guaranteed by the Constitution of the United States.

B. The jury further denied the defendant due process of law by relieving the State of the burden of proving guilt beyond a reasonable doubt.

A defendant in a criminal case is protected against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Jackson v.

Virginia, 443 U.S. 307, 315 (1979), In re Winship, 397 U.S. 358, 374 (1970).

Inferences may be drawn by the trier of fact from other facts which have been proven. However, the inference must be a reasonable deduction; it is not enough that the inferred fact possibly follows from the proven fact. State v. Foord, 142 Conn. 285, 294 (1955). Fitch v. State, 138 Conn. 534 (1952). State v. Schoenbneelt, 171 Conn. 119, 126 (1976). The inference drawn must be strong enough that it is more probable than not that the fact to be inferred is true. Hennessey v. Hennessey, 145 Conn. 211, 214-15 (1958). A conclusion based on conjecture or speculation is not a

product of due process of law. State v. DeCoster, 147 Conn. 502, 504 (1960).

The definition derived from Funk & Wagnall's Dictionary included:

"3. loosely, a conjecture."

By indicating to themselves that inferences could be drawn as conjecture or surmise, the jurors greatly reduced the quantum of proof required to convict the defendant and relieved the State of the burden of establishing guilt beyond a reasonable doubt.

C. The jury deprived the defendant of the assistance of counsel, as guaranteed by the Sixth Amendment to the Constitution of the United States.

The time of instruction to the jury is a critical juncture in the course of

a trial. State v. Ralls, 167 Conn. 408, 419-20 (1974). Since the jury is bound to apply the law as instructed, it is essential that the instructions conform to the law. Counsel is afforded the opportunity to request instructions and to take exception to the instructions as a means of assuring the propriety of the instruction. Fillipon v. Albion Vein Slate Co., 250 U.S. 76, 81 (1919), Shields v. United States, 273 U.S. 583 (1927).

In this case, counsel had no opportunity to take exception to the definition, and no opportunity to argue that a corrective instruction ought to be given.

The definition of inference, supplied to the jury out of the presence

of the Court, and of counsel, deprived the defendant of the assistance of counsel at a crucial moment in the trial, in disregard of the defendant's Constitutional rights.

2. JURY'S USE OF EXTRANEOUS EVIDENCE

The introduction by the jury of evidence not admitted at trial and the performance of experiments by the jury during deliberation denied the defendant the rights of confrontation, of the assistance of counsel, and of cross-examination guaranteed by the Sixth Amendment to the United States Constitution.

The jury misconduct also denied the defendant his right to a trial by an impartial jury as guaranteed by the Sixth Amendment and denied him the

opportunity for a fair trial inherent in the guarantee of due process of law of the Fifth and Fourteenth Amendments to the United States Constitution.

During the deliberations, a juror smuggled a shirt and a belt, concealed in a bag of apples, into the jury room for use in experiments. The defendant had no opportunity to be confronted with the items, or with the results of the experiment. The defendant had no opportunity to test the evidence or to question the premises, the methods or the results of the experiment.

Inherent in the rights of confrontation and of counsel is the right of cross-examination. Chambers v. Mississippi, 410 U.S. 284, 295 (1973). It is an essential and fundamental

requirement of a fair trial and invaluable in assuring the accuracy of the truth-determining process. Id. Cross-examination cannot be had except by the direct putting of questions and obtaining immediate answers. 5 Wigmore Evidence, § 1395 (Chadbourne Rev. 1970).

By examining the items not introduced into evidence, and by engaging in the experiment, the jurors became witnesses against the defendant possessed of certain circumstantial evidence who should have been called as witnesses and been subjected to proper cross-examination before the evidence could be allowed to play a part in the verdict. See 6 Wigmore, Evidence, §§ 1800, 1802 (Chadbourne Rev. 1970).

It is fundamental to a fair trial, by an impartial jury, that no evidence reach the jury unless it be introduced in open court. Turner v. Louisiana, 379 U.S. 466, 472-73 (1965). Parker v. Gladden, 385 U.S. 363, 364 (1966). The right to a trial by an impartial jury lies at the very heart of due process. Irvin v. Dowd, 366 U.S. 717, 721-22 (1961). The jurors' oath required no less. See Connecticut General Statutes, Section 1-25. Evidence introduced at trial is subject to the safeguards of judicial scrutiny as well as the scrutiny of the defendant exercising his rights of confrontation and cross-examination. Where such tainted evidence reaches the jury, their verdict must be set aside if due process is to

be guaranteed. Turner v. Louisiana, supra.

The experiments conducted by the jury were more than a mere application of everyday experiences, although the items used were everyday items. The jurors' need to perform the experiment indicates that the results were beyond their own experience. People v. Brown, 48 N.Y. 2d 388, 399 N.E. 2d 51 (1979). Furthermore, the items used differed substantially from the evidence and rendered the experiments unreliable.

3. PRESUMPTION OF INTENT INSTRUCTION

The trial court erred in instructing the jury that "every person is presumed to intend the natural and necessary consequences of his or her acts". The instruction shifted the

burden of proof and enabled the jury to find intent absent proof beyond a reasonable doubt, in violation of the Fourteenth Amendment to the United States Constitution.

The defendant was charged with the crime of murder and convicted of manslaughter. Both involve intent as a necessary element. Connecticut General Statutes, Section 53a-54a, and Section 53a-55. The Court properly charged the jury that, in order to find the defendant guilty of either murder or manslaughter, they must first find the requisite intent, beyond a reasonable doubt, from facts established by the State. In re Winship, supra, Sandstrom v. Montana, 442 U.S. 510, 524 (1979).

However, the Court's charge that "every man is presumed to intend the natural and necessary consequences of his or her acts" provided the jury with a means of finding the necessary element of intent without evidence. Sandstrom v. Montana, supra.

The Court's charge was phrased in terms of a presumption. A presumption is an evidentiary device which enables a fact-finder to establish an 'ultimate' fact from the proof of a different, 'basic' fact. Ulster County Court v. Allen, 442 U.S. 140, 157 (1979). To presume a fact is to "take or assume [that fact] beforehand, without proof." Morford v. Peck, 46 Conn. 380, 385 (1878) (emphasis supplied). A presumption will be constitutionally

invalid if it affects the strength of the reasonable doubt standard, or if it places the burden of proof upon the defendant. In re Winship, supra, Ulster County Court v. Allen, supra. Sandstrom v. Montana, supra at 523-24.

A reasonable juror could give the presumption either conclusive or persuasion-shifting effect. It cannot be discounted that the jurors in this case actually proceeded upon one or the other interpretation. Sandstrom v. Montana, supra at 519.

The instruction used by the trial court is similar to the instruction invalidated in Sandstrom v. Montana. The instruction is identical to the instruction given in Moye v. Connecticut, 444 U.S. 983 (1979); in

Moye, the judgment of the Connecticut court was vacated and the case remanded for further consideration in light of Sandstrom. On remand, the Connecticut Supreme Court ordered a new trial. State v. Moye, 179 Conn. 761 (1979). Nevertheless, in this case, the Connecticut Supreme Court failed to follow either Sandstrom or Moye. Furthermore, the Connecticut Court has consistently failed to follow the Sandstrom rule except in the most egregious circumstances. Compare, State v. Arroyo, 180 Conn. 171 (1980), State v. Perez, 181 Conn. 299 (1980), State v. Maselli, 182 Conn. 66 (1980), State v. Harris, 182 Conn. 220 (1980), State v. Vasquez, 182 Conn. 242 (1980), State v. Brokaw, 183 Conn. 29 (1981), State v.

Gunning, 183 Conn. 299 (1981), State v. Stankowski, 184 Conn. 121 (1981), State v. Pina, 186 Conn. 261 (1982) State v. Cosgrove, 186 Conn. 476 (1982), State v. Mason, 186 Conn. 574 (1982), State v. Miller, 186 Conn. 654 (1982), State v. Orsini, 187 Conn. 264 (1982), State v. Vitale, 190 Conn. 219 (1983) with State v. Harrison, 178 Conn. 689 (1979), State v. Theriault, 182 Conn. 366 (1980), State v. Johnson, 185 Conn. 163 (1981), Turcio v. Manson, 186 Conn. 1 (1982).

4. RESTRICTION OF CROSS-EXAMINATION

The limitations imposed upon the cross-examination of the state's expert witnesses constituted a denial of his right to confront and cross-examine the witnesses against him, in violation of

the Sixth and Fourteenth Amendments to the United States Constitution.

The Sixth Amendment right of an accused to be confronted with the witnesses against him is secured for defendants in state criminal proceedings. Pointer v. Texas, 380 U.S. 400 (1965). The primary interest secured by the right of confrontation is to secure the opportunity of cross-examination. , Douglas v. Alabama, 380 U.S. 415 (1965), 5 Wigmore, Evidence, § 1395 (Chadbourne Rev. 1970). Cross-examination is the principle means by which the credibility of a witness and his testimony may be tested. Davis v. Alaska, 415 U.S. 308,316 (1974). Cross-examination involves not only testing the witness' perceptions and

recollection, but also involves the opportunity to reveal biases, prejudices or ulterior motives of the witness as they may relate to the issues or personalities of the cause. Davis v. Alaska, supra at 316.

The testimony sought to be elicited from the two dental experts may be separated into two general categories. First, the defendant sought to examine the relationship between Dr. Luntz and law enforcement agencies and the relationship between Dr. Sopher and Dr. Luntz. Second, the defendant sought to examine the accuracy of Dr. Luntz' opinion in a prior case involving similar facts and similar methods of evaluating evidence.

Partiality of mind, whether from bias, prejudice or interest, is always relevant as discrediting a witness. Davis v. Alaska, supra at 316. 3 Wigmore, Evidence, § 940 (Chadbourne Rev. 1970). Such partiality may arise from a relationship between the witness and a party or between witnesses. 3 Wigmore, Evidence, § 945, 949 (Chadbourne Rev. 1970). Partiality is any favor or friendly feeling and may arise from a social or business relationship. McCormick, Evidence, § 40 (2d Ed. 1972). Cross-examination to show bias, motive, interest or prejudice is a matter of right, the denial or undue restriction of which will constitute error. Davis v. Alaska, supra at 316

The defendant sought to elicit from Dr. Luntz information concerning the accuracy of a prior identification made by Dr. Luntz involving similar facts and similar techniques and methods. A defendant is permitted to expose to the jury facts from which the jurors could appropriately draw inferences relating to the reliability of the witness. Davis v. Alaska, supra at 316. When a special qualification is required by a witness, the lack of that qualification may be ascertained by evidence of specific instances of the witness' failure to possess or exercise it. 3 Wigmore, Evidence, § 991 (Chadbourne Rev. 1970). Questions relating to prior erroneous evaluations in similar instances may be put to the witness

himself. Id. The purpose of the inquiry is to test the accuracy and reasonableness of the witness' direct testimony, Floyd v. Fruit Industries, Inc., 144 Conn. 659, 667 (1957), or to expose the unreasonableness of his opinion. Livingstone v. New Haven, 125 Conn. 123, 128 (1939).

The defendant elicited testimony that Dr. Luntz had utilized the methods used in this case in evaluating other bite marks and had offered his opinion as to the origin of such bite marks in other cases. The similarities in both data and examination technique between the prior case and this case laid a foundation sufficient to establish that the facts in the prior matter bore a fair relation to the evidence in this

case. See Floyd v. Fruit Industries, Inc., supra at 666. The defendant sought to establish that the methods used by the expert in this case had, in a prior case, led the expert to an erroneous conclusion.

The trial court can only exercise its discretion to restrict the scope of cross-examination if the defendant has otherwise been permitted cross-examination sufficient to satisfy the constitutional threshold. State v. Gaynor, 182 Conn. 501, 508 (1980). The constitutional standard is met if the defendant is permitted to expose facts from which the jury could appropriately draw inferences relating to the reliability of the witness. Id., Davis v. Alaska, supra at 318. "Prejudice

ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and credibility to a test, without which the jury cannot fairly appraise them". Alford v. United States, 282 U.S. 687, 692 (1929), Smith v. Illinois, 390 U.S. 129, 132 (1968). Here, the defendant was denied an opportunity to impeach a key witness who may have had reason to cooperate with the state. United States v. Summers, 598 F.2d 450, 460 (5th Cir. 1979), United States v. Elliott, 571 F.2d. 880. 908 (5th Cir. 1978).

5. MANSLAUGHTER INSTRUCTION

The court's instruction enabled the jury to find the defendant guilty of an offense without evidence necessary to

the conviction, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The jury's verdict did not distinguish between manslaughter as set forth in Connecticut General Statutes, Section 53a-55(a)(2) (extreme emotional disturbance) or as set forth in Connecticut General Statutes, Section 53a-55(a)(1) (intent to cause serious physical injury). Where a person may have been convicted under more than one statutory alternative, the judgment cannot be supported unless there was evidence to support each alternative. Leary v. United States, 395 U.S. 6, 31-32 (1969). The trial court, in addressing the jury, concluded that no evidence of extreme emotional

disturbance existed. Furthermore, the evidence of extreme emotional disturbance upon which the state relied clearly does not establish the elements required under the standard set forth by the Connecticut Court. Compare State v. Asherman, 193 Conn. 695, 732, 733 (1984).

No evidence of an emotional disturbance, mental disease or mental defect is shown. Intoxication, even if established, is not equivalent to an emotional disturbance. See, State v. Zdanis, 182 Conn. 388 (1980), State v. D'Antuono, 186 Conn. 414 (1982). Evidence of a gruesome homicide is not sufficient to establish an emotional disturbance. State v. D'Antuono, supra. Lack of sleep, intoxication, and

agitation are not the equivalent of extremely unusual or overwhelming states. State v. Zdanis, supra, State v. D'Antuono, supra.

Furthermore, the Connecticut court has adopted a standard, in violation of the guarantees of equal protection of the laws, which requires a defendant to give notice of his intention to rely upon evidence of extreme emotional disturbance but permits the state to introduce and rely upon such evidence without prior notice. In State v. Marino, 190 Conn. 639, 651 n.11 (1983) and in State v. Asherman, supra at 731 n.10, in which the state successfully relied upon evidence of extreme emotional disturbance, the court indicated that no special plea, notice or other formal

assertion is required. Indeed, in both cases, the state gave no notice to the defendant and raised the issue only after the introduction of all evidence. Nevertheless, Connecticut law does require a formal notice from the defendant prior to trial. Connecticut Practice Book, 1978, Sections 758 and 759. Failure to provide such notice may preclude the defendant from raising the defense. Connecticut Practice Book, 1978, Section 758. Those provisions do not apply to the state. No rational justification exists for requiring the defendant to give advance notice without requiring the same of the state. Wardius v. Oregon, 412 U.S. 470, 475 (1973). The state cannot compel a defendant to disclose the details of his case without

being required, itself, to disclose similar details of its case. Id. at 475-76.

6. DESTRUCTION OF EVIDENCE

The introduction of the results of tests which were performed on the destroyed blood sample denied the defendant a fair trial, as guaranteed by the Fourteenth Amendment to the United States Constitution. The destruction of the evidence also denied him the opportunity of presenting evidence on his own behalf, in violation of the due process guarantee of the Fourteenth Amendment.

The determination of whether the destruction of evidence amounted to a deprivation of due process of law depends upon the materiality of the

missing evidence, the likelihood of mistaken interpretation of the evidence and the reason for its nonavailability. State v. Harden, 175 Conn. 315, 326-27 (1978). United States v. Herndon, 536 F. 2d 1027, 1029 (5th Cir. 1976).

Furthermore, the evidence must possess exculpatory value apparent before the evidence was destroyed and be a nature that the defendant would be unable to obtain comparable evidence by other means. California v. Trombetta, ____U.S.____, 81 L. Ed. 2d 413, 422, 104 S.Ct.____, (1984).

In this matter, the evidence was material to the question of the proximity of the defendant to the deceased. A hair of the deceased, embedded in blood on the defendant's key

ring would support an inference that the hair was deposited at the time the blood was fresh. But the defendant and the deceased were close friends and spent considerable time together. Both were medical students; both had clinical exposure to blood. Had the defendant been able to establish, through testing, that the blood on the key ring was not Aranow's blood, he would have defeated the inference that the hair was deposited at the time of Aranow's death.

The remedy for the destruction of the evidence is suppression of the government's testimony relating to that evidence. The blood consumed by the test could not be recreated for testing by the defendant. Since the defendant was deprived of the opportunity to

defeat the inference that the hair was deposited a the time of the decedent's demise, the government should not have been permitted to introduce evidence supporting the inference. Under such circumstances, the probative value of the evidence is substantially outweighed by the danger of prejudice to the defendant. United States v. Stabler, 490 F. 2d 345, 349 (8th Cir. 1974).

A heavy burden is placed upon the state to establish the need for evidence of tests performed on a substance destroyed by the state's testing. People v. Taylor, 54 Ill, App. 3d 454, 12 Ill. Dec. 76, 369 N.E. 2d 573, 576 (1977), People v. Dodsworth, 60 Ill, App. 3d 207, 17 Ill. Dec. 450, 376 N.E. 2d 449, 452 (1978). A criminal defendant is

entitled to an opportunity to have an expert of his choosing, subject to appropriate safeguards, examine physical evidence which may be subject to varying opinion. Connecticut Practice Book, 1978, Section 738. Bernard v. Henderson, 514 F. 2d 744, 746 (5th Cir. 1975). Fundamental fairness, inherent in the due process guarantee, is violated when the defendant is denied the opportunity to evaluate and rebut such adverse evidence. United States v. Owen, 415 F. 2d 383 (8th Cir. 1969).

7. CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Supreme Court of Connecticut.

Respectfully Submitted

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